

No. 53246-8-II

2020 SEP 14 PM 3:25

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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JACOB IVAN SCHMITT,

Appellant,

vs.

PIERCE COUNTY, et al.,

Respondent.

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REPLY BRIEF

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HONORABLE MELISSA HELMSTREET

KITSAP COUNTY SUPERIOR COURT CAUSE NO. 17-2-01111-0

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Jacob Ivan Schmitt #711473  
Appellant, pro se  
Monroe Correctional Complex - TRU  
16774 - 170th Dr. SE/P.O. Box 888  
Monroe, WA 98272

## I. STATUS OF APPELLANT

Jacob Ivan Schmitt (hereinafter "Schmitt") is a pro se appellant currently incarcerated at the Monroe Correctional Complex in Monroe, Washington.

## II. ARGUMENT

### **Plea to the Court**

The Response points out irregularities on my behalf in these pleadings. Respondents Answer @ 14. I beg this Court forgive them.

My attorney in this matter took my case on a contingency basis, and when summary judgment was granted, he abandoned this case without even filing a timely notice of withdrawal so that I could file my notice of appeal pro se.

I am indigent and have no monies. I sought review at public expense, only to learn that I was ineligible. I managed to borrow money from a friends family in order to pay the filing fees and costs associated with designating the record and having the summary judgment hearing transcribed.

I am married and my wife lives in another State. She is the caregiver for her aging Aunt who has dementia and had a stroke. We simply have no money for an attorney, or to even consult an attorney. Even though prisons are supposed to be filled with litigious inmates -- they still charge thousands

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of dollars, and nothing in prison is free.

The injuries from my assault have not healed. During the assault I was lifted into the air and slammed head first onto the concrete floor -- and even having had a 9 hour spinal fusion on my neck on July 17, 2020, I still have at least 4 other herniated disks in my neck. During the assault, I suffered a back injury, which turned out to be a fracture to my T12 and L1. In the simplest of terms, this assault has taken my quality of life and has left me in constant pain, unable to exercise, to work, or to sleep without pain.

Again, I beg this Court forgive me. I have truly done the best that I could. Thank you for hearing my plea.

**I. THE TRIAL COURT SHOULD NOT HAVE GRANTED SUMMARY JUDGMENT IN THIS CASE.**

**A. This case is not about jail classification.**

This claim asserts that on June 17, 2014, Faalogo was released into general population where he had access to Schmitt, who was in a "dead sleep." CP 2, §2.3; CP 3, §2.6; CP 4, §2.14; CP 642. The entirety of this complaint cites to events from June 17, 2014, onwards. CP 1-6. Faalogo was classified on June 16, 2014. CP 747 & 721; CP 795-800.

PCJ should not be permitted to hijack this complaint by intentionally misapprehending this matter to be one relating

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to classification. This case is about misfeasance. Wales manually (with a key) unlocked Schmitt's cell door. CP 355, lines 5-6. After manually unlocking Schmitt's cell door, Wales reset the lock -- without waking Schmitt -- and left Schmitt's cell door ajar. CP 358 lines 2-5. Wales knew Schmitt to be in a "dead sleep." CP 642. Wales had worked at Pierce County Jail since 1996. CP 336, line 17. Wales knew this to be an area of the jail populated by inmates with violent charges, and who were considered by Wales to be "more assaultive to another person." CP 341, lines 23-25. Instead of remaining there to protect Schmitt, Wales left the unit, abandoning Schmitt who was subsequently assaulted and suffered grievous injuries. CP 355-356, line 22-3.

During Schmitt's deposition, PCJ asked Schmitt to agree that Schmitt was raising a classification issue. Schmitt answered: "I will agree with you that that's [a]n opinion and conjecture on my part." CP 301, lines 10-13. Schmitt had just testified that "I feel as if [Faalogo] should not have been released into an area while he had access to me while I was asleep." CP 300, lines 20-22.

Clearly Schmitt did not assert a classification error.

**B. Schmitt's claim does not hinge on expert testimony.**

Our Court has held that "a duty may arise under § 302B comment e, absent a special relationship." *Robb v City of*

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Seattle, 176 Wn.2d 427, 295 P.3d 212, 219 (2013); Kim v Budget Rent A Car Sys., Inc., 143 Wn.2d 190, 196, 15 P.3d 1283 (2001). Schmitt has briefed this issue in the Opening Brief, and will only emphasize here that this allegation of misfeasance hinges on what "a reasonable man" would take into account. Schmitt submits that "a reasonable man" is an everyday citizen, a layperson, a jury member. Not an expert.

**C. PCJ's expert is silent on Wales unlocking Schmitt's cell door while Schmitt was asleep.**

At no time does Mr. Bishop give mention to whether it was appropriate or safe for Wales to unlock Schmitt's cell door without waking Schmitt, and then abandon Schmitt by leaving the unit -- all while Wales knew Schmitt to be in a "dead sleep." CP 33-65. Not only is the expert silent on this, but the Response ignores this issue and the facts in the record surrounding it.

Thus, what we have is a complaint that alleges it was negligent for Wales to subject Schmitt to peril while sleeping -- and nothing in the record that contests the complaint.

How can summary judgment be granted when a plaintiff makes an allegation of negligence, supported by evidence in the record, and the defendant's do not present expert testimony, or even argument that the plaintiff's claim is without merit?

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Summary judgment should not -- and cannot -- be granted for a defendant who ignores the allegations of negligence. The most that should have happened was the trial court should have informed Schmitt that he could not veer into anything at trial that related to the classification of Faalogo. This is correct because PCJ has certainly never asserted that Wales unlocking Schmitt's cell door while knowing Schmitt was asleep, resetting the cell door lock, leaving the cell door ajar, then leaving the unit and abandoning Schmitt to a brutal fate -- PCJ has NEVER argued that any of this was or is an act of classification.

**D. This case is not about the duty owed when a special relationship exists.**

PCJ exhaustively cites cases (from all over the country) that focus on the requirement of foreknowledge by jail/prison staff in order for a plaintiff to hold jail/prison staff liable when a special relationship exists.

However, this complaint is not about the duty owed when a special relationship exists. Rather, this complaint is about the duty which arises when a reasonable person commits an act that he should have realized created an unreasonable risk of harm.

Because this complaint is about misfeasance (an affirmative act) and not about nonfeasance (failure to act),

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virtually all of the briefing by PCJ is not relevant and should not be persuasive.

**E. Schmitt did not dismiss his claim that PCJ was negligent in providing medical care.**

The opposition filed by Schmitt's attorney dismissed the medical negligence claim, while maintaining all other claims. CP 140 lines 2-5. The opposition lists 4 specific allegations, and the last was/is the failure by PCJ to provide pain medication while Schmitt begged for help. Id. at lines 10-13.

"Medical malpractice. (1834) A doctor's failure to exercise the degree of care and skill that a physician or surgeon of the same medical specialty would use under similar circumstances."

**Blacks Law Dictionary, Tenth Edition.**

PCJ cannot commit medical malpractice as they are not medical practitioners. PCJ was negligent in assuring that Schmitt received care for injuries. Because PCJ has presented no expert testimony -- again only providing argument -- that they were not negligent, Schmitt is not required to provide contesting expert testimony. What PCJ has attempted to do is shift their burden of care to a contracted medical provider. Schmitt's claim against ConMed was subject to RCW 7.70, since they are medical professionals. But Schmitt's claim against PCJ is one of

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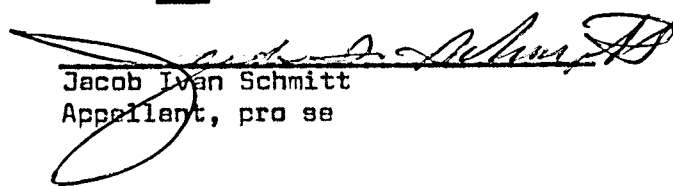
negligence in providing care, not medical malpractice.

If, somehow, RCW 7.70 is now going to be extended to non-medical practitioners -- such as a jail that has an existing duty to provide care for an injured detainee -- then Schmitt should have been afforded the opportunity to secure expert witness testimony. To do otherwise is to permit a defendant with limitless resources to demand that indigent plaintiffs secure experts based on a defendant's demand, instead of at the direction of a Court.

### III. CONCLUSION

Schmitt has not alleged a classification error, and these proceedings are about the duty owed when misfeasance occurs. Summary judgment was improper, and Schmitt asks this Court to reverse the trial court decision, and remand this matter for trial. Any further relief this Court deems appropriate.

Respectfully submitted this 10<sup>th</sup> day of September, 2020.

  
Jacob Ivan Schmitt  
Appellant, pro se

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CERTIFICATE OF SERVICE

I certify that on the below signed date I caused a complete copy of this document to be deposited into the U.S. Mail, postage prepaid, sent to the Pierce County Prosecutor's Office, 955 Tacoma Avenue South, Suite 301, Tacoma, WA 98402.

I DECLARE UNDER THE PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

SIGNED this 10th day of September, 2020, in Monroe, Washington, County of Snohomish.

  
Jacob Ivan Schmitt  
Appellant, pro se

Jacob Ivan Schmitt #711471  
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Clerk, Division Two  
950 Broadway Avenue South  
Suite 300  
Tacoma, WA 98402

RE: CASE NO. 53246-8-II

September 10, 2020

Dear Clerk,

You will please find enclosed the reply brief in the above case, along with a certificate of service.

Thank you very much for your patience and consideration during these proceedings. I hope you and yours remain safe and healthy in this time of crisis.

Sincerely,

  
Jacob Ivan Schmitt

RECEIVED

SEP 11 2020

CLERK OF COURT OF APPEALS DIV II  
STATE OF WASHINGTON